FILED
AUG 29 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 280

UNITED STATES OF AMERICA, *Petitioner*

v.

PAUL TANNER

UNITED STATES OF AMERICA, *Petitioner*

v.

ELIZABETH RUTH PAUL, Executrix of the Estate of Earle Evarts Paul, Deceased

On Petition for Writs of Certiorari to the United States Court of Claims

BRIEF FOR RESPONDENTS IN OPPOSITION

BURR TRACY ANSELL,
Counsel for Respondents
712 Tower Building
Washington 5, D. C.

Of Counsel:
ANSELL AND ANSELL

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinion Below	1
Jurisdiction	1
Question Presented	8
Statutes Involved	9
Statement	9
Argument	10
I. The Decision Presents No Issue of General Importance	11
II. The Decision Is Correct	16
Conclusion	23
Appendix	24

CITATIONS

CASES:

Adams et al. v. *United States*, 129 C. Cls. 792, 125 F. Supp. 240 ..... 7, 27
Appell v. *United States*, 128 F. Supp. 153 7
Bowman v. *Loperena*, 311 U.S. 262 6
Cole v. *Violette*, 319 U.S. 581 8
Coppard v. *Atascosa County State Bank*, 56 F. 2d 1023, cert. den. 286 U.S. 555 ..... 5 fn.
Crist v. *United States*, 124 C. Cls. 825 7
Dartmouth College v. *Woodward*, 4 Wheat. 518 22
Department of Banking v. *Pink*, 317 U.S. 264 ..... 2, 4
Federal Trade Commissioner v. *Minneapolis Honeywell Regulator Co.*, 344 U.S. 206 ..... 4, 6
Fowler v. *Hamill*, 139 U.S. 549 4
Frizzell v. *United States*, 123 C. Cls. 337, 444 7
Hadden v. *United States*, 125 C. Cls. 137, 126 C. Cls. 944 7
Leonard v. *United States*, 128 F. Supp. 957 7
Nickell v. *United States*, 123 C. Cls. 859, 125 C. Cls. 870 7
Paul v. *United States*, 129 C. Cls. 792, 125 F. Supp. 240 ..... 1, 7, 24, 27
Reynolds v. *United States*, 125 C. Cls. 108, cert. den. 346 U.S. 826 15

Page

Seagrave v. *United States*, 128 F. Supp. 400 7
Smith v. *United States*, 128 C. Cls. 444 7
Tanner v. *United States*, 129 C. Cls. 792, 125 F. Supp. 240 ..... 1, 5, 7, 27, 28
United States v. *Hark*, 320 U.S. 531 3
Yznaga del Valle v. *Harrison*, 93 U.S. 233 ..... 5 fn.

STATUTES:

Act of June 1, 1872, 17 Stat. 196 8
Act of March 3, 1891, 26 Stat. 828 8
Act of July 31, 1894, 28 Stat. 205, 5 U.S.C. 62 ..12, 13, 16, 29, 30
Act of May 10, 1916, 5 U.S.C. 58 30
Act of May 12, 1917, 40 Stat. 72 17
Act of February 13, 1925, 43 Stat. 940 8
Act of July 1, 1930, 46 Stat. 841 ..... 12, 13
Act of July 1, 1947, 61 Stat. 238 ..... 9, 11, 14, 16, 17, 20, 22

Section 1(a) 16, 17
Section 1(b) 8, 10, 17, 18

Act of June 29, 1948, Title III, 62 Stat. 1081, 1087, 10 U.S.C. 1036a *et seq.* 8, 9, 10, 13, 15, 19, 20, 21, 22
Act of August 4, 1951, 65 Stat. 174 ..... 15 fn.
Economy Act of 1932, Section 212(a), 47 Stat. 406 8, 9, 12, 14, 18fn., 20, 21, 22, 29, 30
Naval Reserve Act of 1938, Section 4, 52 Stat. 1176 .14, 18
Public Law 212, Section 212, 72d Congress 21
Public Law 94, 84th Cong., 1st Sess. 12
Public Law 239, 84th Cong., 1st Sess. 14, 15, 16, 20
28 U.S.C. § 2101(c) 2, 3, 4, 6

MISCELLANEOUS:

11 Comp. Dec. 422 12
1 Comp. Gen. 544 17
1 Comp. Gen. 700 12
10 Comp. Gen. 85 12
13 Comp. Gen. 60 12
13 Comp. Gen. 161 12
14 Comp. Gen. 289 12
21 Comp. Gen. 1129 12

Page

25 Comp. Gen. 521 ..... 18 fn.
28 Comp. Gen. 367 13
95 Cong. Rec. 13336 20
101 Cong. Rec. 8481 20
101 Cong. Rec. 10581 21
Hearings before Subcommittee No. 11, Legal, Committee on Armed Services, on H.R. 1845, 80th Cong., 1st Sess. [No. 139] 17, 18
House Report 483, 80th Cong., 1st Sess. 18
H.R. 1845, 80th Cong., 1st Sess. 17, 18, 19
H.R. 3144, 80th Cong., 1st Sess. 17
H.R. 5893, 84th Cong., 1st Sess. 14, 16, 20, 29, 30, 31
H.R. 7049, 84th Cong., 1st Sess. 21, 22
Letter Report of General Accounting Office to Committee on Finance, United States Senate, upon H.R. 5893, 84th Cong., 1st Sess. 16, 22, 29
Official Army Register, 1 January 1953, Vol. I, p. 1317 15
S. 2351, 81st Cong., 1st Sess. 20
Senate Report 327, 80th Cong., 1st Sess. 18
Senate Report 1543, 80th Cong., 2d Sess. ..... 15 fn.
Senate Report 1023, 84th Cong., 1st Sess. 29

U. S. Ct. Cl. Rules, 28 U.S.C.A.:

Rule 50 ..... 4, 5, 24
Rule 51 25
Rule 51(d) 4, 25
Rule 52 25
Rule 53(c) 5, 6, 26
Rule 73 ..... 25, 26

U.S. Sup Ct. Rules, 28 U.S.C.A.:

Rule 23(1)(c) ..... 9 fn.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 280

UNITED STATES OF AMERICA, *Petitioner*

v.

PAUL TANNER

UNITED STATES OF AMERICA, *Petitioner*

v.

ELIZABETH RUTH PAUL, Executrix of the Estate of Earle Evarts Paul, Deceased

---

On Petition for Writs of Certiorari to the United States Court of Claims

---

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Claims in both cases (R. 97-103; Appendix to Petition, 19) is reported at 129 C. Cls. 792 and also at 125 F. Supp. 240.

JURISDICTION

The petition for writs of certiorari was not filed within the time allowed by law. In respect of matters

such as these, 28 U.S.C. § 2101(c) provides that application for the writ must be made "within ninety days after the entry of such judgment". The filing of a timely motion for rehearing operates to extend the time to ninety days following its denial. See *Department of Banking* v. *Pink*, 317 U.S. 264, 266.

In these cases, the Court of Claims rendered its opinion on November 2, 1954 (R. 97; App. to Petition, 19). The opinion granted the respondents' motion for summary judgment and denied the petitioner's motion therefor (R. 103; App. to Petition, 25). Notations to that effect were made in the court's docket that day (Appendix A, *infra*).[1] After rendition of the court's opinion, there remained only the computation of the amounts of retired pay which the respondents should recover in accordance with the opinion. The Court of Claims therefore suspended the entry of judgment to await reports by the General Accounting Office showing the amount due the respondents (R. 103; App. to Petition, 26, 27). In the meanwhile, the petitioner filed a motion for rehearing (styled "motion for reconsideration") which the court denied February 8, 1955 (R. 105). On April 19, 1955, the General Accounting Office reported the amounts due the respondents (R. 107-109; App. to Petition, 26, 27). On May 3, 1955, the court entered formal judgment for the respondents in the amounts reported by the General Accounting Office R. 107-109; App. to Petition, 26, 27).

The respondents say that the opinion of November 2, 1954, was the judgment of the Court of Claims and

[1] No reference to these docket entries is contained in the certified record filed with the Court by the petitioner. The respondents have copied the entries from the docket of the Court of Claims and reproduced them in Appendix A hereto.

that the rendition of the opinion on that day constituted the entry of such judgment for the purpose of initially fixing the time within which a petition for the writ is required to be filed as provided by 28 U.S.C. § 2101(c). "The judgment of a court is the judicial determination or sentence of the court upon a matter within its jurisdiction. No form of words and no peculiar formal act is necessary to evince its rendition or to mature the right of appeal." *United States* v. *Hark*, 320 U.S. 531, 534.

The entry of the court's opinion on November 2, 1954, resolved the single issue in these cases by granting the respondents' motion for summary judgment. The record shows that the whole controversy here is whether the respondents may receive retired pay at all. There has never been any dispute as to the amount of such pay they should receive, once their right to receive pay has been established. The computation of the extent of their recovery, assuming that they are entitled to recover, is a simple act governed by explicit provisions of statute similarly applied day after day by finance and accounting officers of the Government in paying thousands of officers retired under the same law as the respondents.[2]

The Court of Claims recognized the lack of any substantial problem involved in computing the amounts of pay due in accordance with its opinion. It left this ministerial responsibility fittingly to an administrative agency, the General Accounting Office. When that Office filed its report, the court incorporated the amounts shown to be due the respondents in formal

[2] The respondent Paul is actually the widow and executrix of the estate of a deceased officer, as the petitioner observes (R. 10; Petition, 6 fn).

judgments and entered the judgments without more (R. 107-109). Neither the petitioner nor the respondents raised any question as to the amounts reported by the General Accounting Office and now represented in the judgments of the Court of Claims sought to be reviewed. The petitioner does not now raise any such question.

Under these circumstances, the opinion of November 2, 1954, granting the respondents' motion for summary judgment followed by the denial of the petitioner's motion for rehearing settled finally the legal rights and obligations of the parties. The subsequent report of the General Accounting Office and formal entry of judgment did not disturb or revise the effect of the opinion in any respect. In this light, the rendition of the opinion of November 2, 1954, established the date from which the time for applying for certiorari would have been computed but for the filing of a timely motion for rehearing. *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206; see *Fowler* v. *Hamill*, 139 U.S. 549. Then, upon the seasonable filing of the petitioner's motion for rehearing, the time prescribed by 28 U.S.C. § 2101(c) was tolled until denial of the motion on February 8, 1955. *Department of Banking* v. *Pink, supra.* Again, the ninety-day period began to run, and thereafter it ran without interruption until it expired May 9, 1955.

The foregoing effect of the opinion of November 2, 1954, as a judgment of the court is required as fully by the rules of the Court of Claims as by general legal principles expounded by this Court. See U. S. Ct. Cls. Rules 50 and 51(d), 28 U.S.C.A., which are set out in pertinent part in Appendix B, *infra.* Rule 51(d) requires that, upon a motion for summary judgment, if

there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law, the "judgment sought shall be rendered."[3] And Rule 50 defines "judgment" to include "any decree or order subject to a petition for writ of certiorari."

The substance of the order of the Court of Claims entering formal judgment on May 3, 1955, in *Tanner* is also of significance in establishing that the court regarded its opinion of November 2, 1954, as the real judgment. The respondent Tanner claimed in paragraph VII of his petition retired pay "extending to the date judgment may be entered herein." (R. 3-4) His motion for summary judgment was based in part upon the petition (R. 47). The court granted his motion and thus established his right to retired pay to the date of judgment as claimed. The court thereafter ordered that judgment be entered in favor of respondent Tanner for the amount of pay due him to November 2, 1954 (R. 107; App. to Petition, 26). Such an order is consistent only with the concept that the opinion of November 2, 1954, was the judgment of the court.

Further reference to the rules of the Court of Claims discloses that the petitioner itself treated the opinion of November 2, 1954, as the judgment of the court. Rule 53(c) provides for the filing of a motion for rehearing "not later than 30 days after the entry of the judgment." (Appendix B, *infra*) On December 2, 1954, the thirtieth day after the opinion was rendered, the Assistant Attorney General moved for an extension to January 3, 1955, of the time within which the petitioner

[3] "Rendered" and "entered" are frequently synonymous. See *Yznaga del Valle* v. *Harrison*, 93 U.S. 233; *Coppard* v. *Atascosa County State Bank*, 56 F. 2d 1023 (CCA 5th, 1932), cert. den. 286 U.S. 555.

might file a motion for "reconsideration".[4] It is plain that the motion was made upon the Assistant Attorney General's recognition that the opinion of November 2, 1954, was a judgment under Rule 53(c) which would have barred a motion for rehearing after December 2, 1954, in the absence of an enlargement of the time provided thereby. And it would not be an unreasonable inference that the Assistant Attorney General had in mind also that, through the use of this vehicle, the petitioner might further postpone the period within which it must ask review of the judgment by this Court without undergoing the risk of losing all possibility of review by a refusal on the part of the Court of Claims to entertain or consider an untimely motion for rehearing. See *Bowman* v. *Loperena,* 311 U.S. 262, 266.

Finally, the underlying purpose of 28 U.S.C. § 2101(c) is frustrated if the orders of May 3, 1955, rather than the opinion of November 2, 1954, may be viewed as the judgment in these cases. Congress clearly intended by 28 U.S.C. § 2101(c) to assure a definite and short end to litigation which has reached a settlement of its genuine issues in the courts of last resort before the Supreme Court. *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co., supra.* Here final determination of the entire dispute was had by the opinion of November 2, 1954, when the petitioner's motion for rehearing was denied February 8, 1955. The later proceedings in the Court of Claims were collateral to the issue and mechanical by nature. They represented the usual treatment of convenience applied

---

[4] The record filed by the petitioner does not note the filing of this motion for extending the time within which it might seek rehearing or the allowance of the motion by the court. The motion and the court's order are reproduced as Appendix C hereto.

by the Court of Claims to claims for military pay which have been adjudicated in favor of the claimants. See, for example, *Leonard* v. *United States,* 128 F. Supp. 957, 959 (1955); *Seagrave* v. *United States,* 128 F. Supp. 400, 404 (1955); *Appell* v. *United States,* 128 F. Supp. 153, 154 (1955); *Hadden* v. *United States,* 125 C. Cls. 137, 141 (1953); *Crist* v. *United States,* 124 C. Cls. 825, 827 (1952); *Nickell* v. *United States,* 123 C. Cls. 859, 863 (1952); *Frizzell* v. *United States,* 123 C. Cls. 337, 342 (1952); and *Smith* v. *United States,* 122 C. Cls. 444, 450 (1952).

It is of direct interest to observe that this practice of the Court of Claims results, as should be expected, in a variable, but always substantial, interval between rendition of the opinion disposing of the issues of a case or denial of rehearing where sought and entry of the formal judgment. Examination of the published reports of the foregoing cases where this procedure was invoked fails to indicate that formal judgments have been entered in *Leonard, Seagrave,* and *Appell.* In the others, the time intervening between the opinion or denial of the motion for rehearing and formal judgment was roughly five months in *Hadden,* 126 C. Cls. 944; four months in *Crist,* 124 C. Cls. 825, 827; four and one-half months in *Nickell,* 125 C. Cls. 870; nine months in *Frizzell,* 123 C. Cls. 337, 342; and four months in *Smith,* 122 C. Cls. 444, 451. It should also be noted in this connection that the Court of Claims similarly withheld entry of judgment in *Adams et al.* v. *United States,* 129 C. Cls. 792, the companion case decided in the same opinion as *Tanner* and *Paul* (R. 97-103; App. to Petition, 19-25) and that the General Accounting Office has not yet, over six months after the petitioner's motion for rehearing was denied (R.

105), reported the amounts due the claimants in that case.

Thus, if the petition herein is seasonable, it is apparent that the time limitation upon seeking review of this Court has been indefinitely avoided in an important class of litigation by the practice of the Court of Claims. The period fixed for asking review has been rigidly and progressively shortened by Congress. See Act of June 1, 1872, 17 Stat. 196 (two years); Act of March 3, 1891, 26 Stat. 828 (one year); and Act of February 13, 1925, 43 Stat. 940 (three months). It is inconceivable that Congress has permitted its limitation to go for nought in cases where the Court of Claims has determined the issues and then resorts to an administrative agency for the mechanics involved in transforming its decision into a formal judgment. See *Cole* v. *Violette,* 319 U.S. 581.

It is submitted that the leisurely course of the petitioner in filing for the writ has placed these causes beyond the power of review by this Court. The petition is late and should be denied.

QUESTION PRESENTED

The respondents are officers of the Officers Reserve Corps retired under Section 302(a), Title III, Act of June 29, 1948, 62 Stat. 1081, 1087, 10 U.S.C. 1036a, for long service in the reserves upon attaining the age of 60 years. They are also civilian employees of the Federal Government paid at an annual rate in excess of $3,000. The single question on the merits is whether, by virtue of Section 1(b), Act of July 1, 1947, 61 Stat. 238, 239, such officers may receive their retired pay provided by Title III, Act of June 29, 1948, without regard to the limitations imposed by Section 212(a) of the Economy Act of 1932, 47 Stat. 406, upon the re-

ceipt of retired pay for commissioned service in the Army and civilian compensation from the Government.[5]

STATUTES INVOLVED

The pertinent provisions of Section 212(a) of the Economy Act of 1932, 47 Stat. 406, as of the dates involved in this case; of the Act of July 1, 1947, 61 Stat. 238, 239, 10 U.S.C. (1946 ed.), 371b, also as of the dates involved herein; and of Section 302(a), Title III, Act of June 29, 1948, 62 Stat. 1081, 1087, 10 U.S.C. 1036a, are set forth in the Petition at pp. 2-4.

STATEMENT

The respondents, officers of the Officers Reserve Corps retired under Title III, Act of June 29, 1948, *supra* (Petition, 4), have not been paid any of the retired pay provided for such officers in that Act by reason of their continued employment by the United States in civilian capacities at annual salary rates in excess of $3,000. Following their retirement as reserve officers, they were advised by the Army that their retired pay under the Act of June 29, 1948, was subject to the restrictions of the Economy Act of 1932, *supra* (Petition, 2), and, as they were civilian employees of the Federal Government with salaries at annual rates in excess of $3,000, they could not receive retired pay. The respondents thereafter brought suit in the Court of Claims to recover their retired pay.

---

[5] The petitioner has misstated the question presented (Petition, 2). By ignoring the requirement of Rule 23(1)(c) that the question be "expressed in the terms and circumstances of the case", the petitioner has created the appearance here of a question affecting every reserve officer of the Army retired under any law. Actually, the question relates only to reserve officers of the Army retired under Title III, Act of June 29, 1948. See Argument, p. 14, *infra*.

The Court of Claims held, in an opinion rendered November 2, 1954, upon all parties' motions for summary judgment, that section 1(b) of the Act of July 1, 1947, providing that "no existing law shall be construed to prevent any member of the Officers' Reserve Corps * * * from accepting employment in any civil branch of the public service nor from receiving the pay incident to such employment in addition to any pay and allowances to which he may be entitled under the laws relating to the Officers' Reserve Corps" permits the respondents as members of the Officers Reserve Corps to receive their retired pay under Title III, Act of June 29, 1948. The court, accordingly, granted the respondent's motion for summary judgment.

ARGUMENT

The decision below is of insufficient moment to warrant exercise of this Court's jurisdiction. It applies to an unascertainable number of reserve officers of the Army representing a relatively small fraction of all such officers. The ones who are affected are, broadly stated, those civilian employees of the United States who, having reached the age of 60 years and completed at least 20 years of satisfactory service in reserve components of the armed services, are retired under Title III, Act of June 29, 1948, *supra,* (Petition, 4), and thereafter continue to earn a living from their employment with the Federal Government. How narrow the decision really is will be shown hereinafter.

If the decision should seem to be of importance in any aspect, however, it is right. It reflects the intransigent policy of Congress following World War II to build and maintain a large, trained, and active reserve force through the means of offering incentives for reserve service. The decision does this in consonance

with the letter, spirit, and purpose of the Act of July 1, 1947.

I

The Decision Presents No Issue of General Importance.

The petitioner represents (Petition, 7) that the decision of the Court of Claims tortures the Act of July 1, 1947, beyond its design. The result, the petitioner says, is that the court has held that reserve officers who are employees of the Government are entitled to double pay while regular officers are entitled to nothing.[6] The petitioner concludes that this utterly confuses the relationship between the retirement provisions for regular and reserve officers.

The probable implication of all that the petitioner says in this respect is that these conditions make an important Federal question. Remarkably, the petitioner does not undertake to describe either the "relationship between the retirement provisions for regular and reserve officers" or the "utter confusion" to which the Court of Claims has consigned it. Obviously a mere reference to "relationship" and "confusion" does not create an important Federal question.

The fact, of course, is that *some* relationship does exist between the incidents of the respective retirement of reserves and regulars. But the actual relationship, disregarding the effect of the decision herein sought to be reviewed, is hardly of the sort which the petitioner hoped to suggest to the Court. The incidents of reserve retirement vary from those of regular retirement in literally hundreds of respects. The respondents cannot here presume to impose upon the Court by pointing out all or even many of the differences. Specification

[6] Under the decision below, reserve officers of the class here concerned are entitled to their civilian salary and to retired pay amounting to a fraction of the retired pay of regulars, *infra*, p. 15.

of simply the following single contrast should suffice to expose and allay the bogy advanced by the petitioner:

a. *Regulars.* A different statute from the Economy Act has for 61 years barred regular officers of the armed services, retired for age or length of service as respondents were, from virtually any Federal civilian employment when either their retired pay or the civilian compensation exceeds $2,500 a year. Section 2 of the Act of July 31, 1894, 28 Stat. 205, 5 U.S.C. 62, which is set out as Appendix D, *infra*, prohibits the civilian employment by the Federal Government of any regular officer, except officers of the armed services retired for physical disability, when either the retired pay of the officer or the compensation of the civilian position exceeds $2,500 a year.[7] The statute has been uniformly so construed. See 21 Comp. Gen. 1129, (1942); 14 Comp. Gen. 289, 292 (1934); 13 Comp. Gen. 161, 162 (1933); 13 Comp. Gen. 60 (1933); 10 Comp. Gen. 85 (1930); 1 Comp. Gen. 700 (1922); and 11 Comp. Dec. 422 (1905). As the minimum salary of a GS grade in Civil Service is now $2,690 a year (Pub. L. 94, 84th Cong., 1st Sess., June 28, 1955), it follows that a retired regular officer not of a class particularly exempted from the operation of the Act of July 31, 1894, may not even hold employment in a civilian capacity with the United States, much less receive a salary therefrom.

b. *Reserves.* On the other hand, reserve officers not on active duty have long been specifically excepted from the Act of July 31, 1894. The Act of July 1, 1930, 46 Stat. 841, provided that

---

[7] Retired regular officers elected to public office or appointed to office by the President with the advice and consent of the Senate are also excepted from the prohibition by the terms of the statute.

> "Reserve officers while not on active duty shall not, by reason solely of their appointments, oaths, commissions, or status as reserve officers, or any duties or functions performed or pay or allowances received as reserve officers, be held or deemed to be officers or employees of the United States, or persons holding any office of trust or profit or discharging any official functions under or in connection with any department of the Government of the United States."

The Comptroller General held, shortly after the approval of the Act of June 29, 1948, that reserve officers retired under Title III of that Act are outside the effect of the Act of July 31, 1894, by virtue of the Act of July 1, 1930. 28 Comp. Gen. 367, 368 (1948). That holding of the Comptroller General has never been modified.

In these circumstances, it would seem that the Comptroller General's decision accurately depicts the present administrative practice: regular officers in a retired status for age and longevity generally cannot be employed in a civilian capacity by the Government while reserve officers similarly situated not only can accept civilian employment but also can receive full compensation therefor, provided they draw no retired pay. It is more than hard to understand how any disturbance of so disparate a relationship could be a matter of great import. If the decision of the court below adds to the disparity, the added effect is small in relation to the unbalance otherwise existing.

But, the petitioner continues (Petition, 7-8), the decision of the Court of Claims extends beyond the Army to the Air Force, and its rationale applies to all the armed services, and indeed, may apply to every retired reserve officer who is a Government employee.

And, "partial estimates" from unidentified sources indicate 3,000 potential claimants with liability perhaps totalling several millions of dollars.

Again, the petitioner omits to supply the reason or other authority for representations made in its effort to persuade the Court that the decision below involves a question of enough importance to justify review. Accordingly, the respondents are handicapped in testing the petitioner's statements as the Court will be in weighing them.

Except for the happening of an event after the Petition herein was filed on July 29, 1955, the respondents would have been able merely to point to the circumstance that the Court of Claims was dealing in these cases with one set of laws relating to retirement, whereas reserve officers of the Navy, Marine Corps, and Coast Guard, as well as some Army and Air Force reserve officers, are retired under different statutory schemes. For instance, it cannot be successfully maintained that officers of the Naval Reserve may avail themselves of the Act of July 1, 1947, which affects only members of the Officers Reserve Corps, an Army component. Naval reservists must look to their own laws such as Section 4 of the Naval Reserve Act of 1938, 52 Stat. 1176, which is phrased similarly to but not the same as the Act of July 1, 1947.

Extended argument in that direction is not now necessary. On August 4, 1955, Public Law 239, 84th Cong., 1st Sess., was enacted by the President's approval of H.R. 5893 on that day. The new statute directly amended Section 212(a) of the Economy Act by increasing its retired pay and salary limitations from $3,000 to $10,000.

It is manifest that Public Law 239, standing alone, has the effect of fully satisfying for future periods the entitlement to retired pay of many reserve officers-civilian employees retired under Title III of the Act of June 29, 1948, and substantially satisfying the entitlement of all but a few. This is evident in the light of the relatively low rate at which reserve officers retired under Title III are paid.[8] To illustrate: a regular officer of the respondent Tanner's grade (lieutenant colonel) and with exactly the same service in the Army (over 30 years commencing in 1917) who was retired for age or longevity on the same date as Tanner (June 30, 1952) would have received retired pay at the rate of $455.72 a month as compared with Tanner's retired pay of $159.50. See Official Army Register, 1 January, 1953, Vol. I, p. 1317. This wide difference in pay results from the more generous provisions made by Congress for retired regulars. *Reynolds* v. *United States,* 125 C. Cls. 108 (1953), cert. den. 346 U.S. 826.

Regardless of any importance that may have attached to the question here at the time the Petition was filed, the subsequent enactment of Public Law 239 makes inapposite much of what the Petition asserts in this respect. Certainly, a substantial part of any "utter confusion" of the relationship between regular and reserve retirement created by the decision below cannot be undone by this Court, for retired reserves like respondents can now receive up to $10,000 a year in combined civilian salary and retired pay and

---

[8] The average pay of an officer retired under Title III, Act of June 29, 1948, was estimated in 1948 to be $674 a year. Senate Report 1543, 80th Cong., 2d Sess. The minimum pension allowed to veterans for 90 days of service in the Spanish-American War is more. See Act of August 4, 1951, 65 Stat. 174.

retired regulars in the same status can still receive nothing but retired pay because the Act of July 31, 1894, remains unchanged. See the letter report of the Comptroller General to the Senate Finance Committee considering H.R. 5893 (Appendix E, *infra*) wherein he especially brought the Act of July 31, 1894, to the attention of the Committee and expressed his desire for a revision of it. Despite the Comptroller General's concern, H.R. 5893 became Public Law 239 without touching the Act of July 31, 1894. And, although there may still be future liability for millions of dollars in retired pay to thousands of reserve officers who are civilians employed by the Government, as the petitioner asserts, the principal responsibility for that condition will rest upon Congress and the President for Public Law 239 and not upon the courts for the decision below.

II

The Decision Below Is Clearly Correct.

Upon a thorough study of the language of the statute, the history of its enactment, and the administration of its provisions, the Court of Claims correctly accorded natural meaning to the terms in which the Act of July 1, 1947, was expressed. There can be no real dispute that the "pay and allowances" which the Act permits to be paid to reservists having civilian employment with the United States would, in the ordinary significance of the phrase, include retired pay.

The petitioner insists, however, that the sole purpose of the Act was to grant to enlisted men of the Army reserve who are Government employees the same rights relating to military leave of absence from their civilian occupations as were already enjoyed by reserve officers of the Army and by all Naval reservists. But Section

1(a) of the Act, read alone, grants to all reservists of the Army "the same right to leave of absence for 15 days of military duty and to receive *for that military duty* pay and allowances in addition to civilian salary" as the petitioner says is granted by Sections 1(a) and 1(b), read together. Section 1(b) adds nothing to Section 1(a) in this particular as becomes apparent when it is considered that officers of the Army reserve, commencing in 1917, have enjoyed the right to 15 days of military leave and to receive both military pay and civilian salary during that period of leave under provisions of the Act of May 12, 1917, 40 Stat. 72, quite similar to Section 1(a). 1 Comp. Gen. 544 (1922).

The petitioner's contention as to the singleness of the purpose and effect of the Act of July 1, 1947, thus would leave Section 1(b) without meaning. It should be rejected for that reason alone. But there are other compelling reasons why the court below was right in attributing to Section 1(b) the effect of the usual sense of its language.

As introduced, H.R. 1845, which became the Act of July 1, 1947, was designed simply to extend to enlisted reservists the rights to military leave and job restoration theretofore held by reserve officers. When considered by Congress, however, it had been supplanted by a wholly new bill, also called H.R. 1845. The new H.R. 1845 had been derived from still another bill, H.R. 3144, which had been framed by the War and Navy Departments upon instructions from the House Armed Services Committee to draft "a new bill to take care of all the outstanding problems." This is disclosed in the record of the hearings held on H.R. 1845 by a subcommittee of the House Armed Services Committee (Hearings before Subcommittee No. 11,

Legal, Committee on Armed Services, on H.R. 1845, 80th Cong., 1st Sess. [No. 139].

At the hearings, Navy Captain Nunn, the principal witness, explained the purpose of the expanded H.R. 1845 (id. at p. 2243):

> "Subsection 1(b) gives members of both enlisted and officers reserve corps the same right to re-employment in any civil branch of the public service, *to receive pay and allowances incident to such employment in addition to pay and allowances they may be entitled to,* and to practice civil professions or occupations before or in connection with any department of the Federal Government. *It gives them those rights that naval reservists now have under the last provision of Section 4 of the Navy Reserve Act of 1938* * * * ". [Emphasis supplied][9]

Captain Nunn's testimony was paraphrased and adopted by the Committee for House Report 483, 80th Cong., 1st Sess., in stating the effect of what became Section 1(b) of the Act.

When the Senate Armed Services Committee reported H.R. 1845 without amendment, it was again shown clearly that the purpose of the bill considerably exceeded its original confines (Senate Report 327, 80th Cong., 1st Sess.):

> "The purpose of this bill is to unify the existing laws pertaining to the granting of military leave to permanent and indefinite employees of the United States who are members of the Reserve

---

[9] Retired members of the Naval Reserve had a right under the last proviso of Section 4 of the Naval Reserve Act of 1938, 52 Stat. 1176, to receive civilian compensation and retainer or retired pay without regard to Section 212(a) of the Economy Act. 25 Comp. Gen. 521 (1946).

Components of the various services including the National Guard.

"In addition, the bill clarifies the rights of civil employees to compensation for their service with the Reserves and prevents the loss of any rights which they normally would have in relation to their occupation.

* * * * *

"The bill clarifies the point that members of the Reserve Corps are entitled to pay from their Reserve organizations in addition to their normal civil pay * * * " [Emphasis supplied]

H.R. 1845 thereupon passed the Senate without amendment and became law.

The legislative history of H.R. 1845 upon which the respondent relies (Petition, 9-12) is thoroughly consistent with the result reached by the Court of Claims when viewed in the light of the foregoing account of the course of the bill through Congress. All that can be said of Captain Nunn's statement (Petition, 9-10) is that the portions quoted by the petitioner will more accurately depict all of the bill's objects when read with the portion of the same statement quoted by the respondents, *supra,* p. 18. As for the cost estimate contained in the House Committee report (Petition, 12), it is obvious that, when it was made, the only additional cost involved in the bill related to enlisted men. At that time, there was no military retired status with entitlement to pay which could have been occupied by a member of the Officers Reserve Corps.

In an attempt to buttress its argument, the petitioner resorts to a colloquy on the House floor when the Act of June 29, 1948, was debated (Petition, 13-14). The member in charge of the bill, evidently taken unaware

by a question, expressed his view in general terms that the Economy Act would apply to prohibit the receipt of retired pay under the bill if a reserve officer should be civilly employed at a salary of over $3,000. If this offhand opinion establishes that Congress has not considered that the Act of July 1, 1947, exempts reserve officers retired under Title III, Act of June 29, 1948, as the petitioner asserts that it does, then there is ample evidence of more cogent nature that Congress later changed its mind.

First, in 1950, a bill, S. 2351, to "simplify and consolidate the laws relating to the receipt of compensation from dual employments under the United States" passed the Senate and the House. S. 2351 was plainly designed as a mere codification of existing laws relating to dual compensation except that it raised the limit on such annual compensation from the then existing $3,000 to $5,000. 95 Cong. Rec. 13336. *One provision of S. 2351 as it passed both Houses specifically exempted from all dual-salary limitations retired pay provided by Title III of the Act of June 29, 1948.* The House version of S. 2351 differed from the Senate-approved bill in other respects, and the measure died in conference with the adjournment of the 81st Congress.

Then, when H.R. 5893, which became Public Law 239, 84th Congress, amending Section 212(a) of the Economy Act by raising its ceiling to $10,000, *supra*, p. 14, was considered by the House on July 5, 1955, the following question by Mr. Haley, a member of the Veterans Affairs Committee reporting the bill, and answer by Mr. Aspinall, in charge of the bill and also a member of that Committee, immediately preceded its passage by consent (101 Cong. Rec. 8481):

"MR. HALEY. Mr. Speaker, reserving the right to object, I would like to ask a question of the gentlemen in charge of the bill as to some of the language appearing in the report. I notice that there are only two exceptions made in this particular case.

"MR. ASPINALL. There are two exceptions to the general statement, as the gentleman suggested. The prohibition does not apply to any regular or emergency commissioned officer retired for disability on a basis (1) of an injury incurred in combat with an enemy of the United States, or (2) caused by an instrumentality of war. *The amendments to this act will not have any effect on the right of Reserve or National Guard officers to draw civilian compensation without regard to section 212 of Public Law 212, 72d Congress* [*Economy Act of 1932*]." [Emphasis supplied]

Last, on July 30, 1955, H.R. 7049 codifying all the laws relating to the armed forces was called on the consent calendar of the House. At that time, Mr. Haley questioned Mr. Willis, who had served as chairman of the subcommittee of the Committee on the Judiciary hearing the bill and was in charge of the bill (101 Cong. Rec. 10581):

"MR. HALEY. Mr. Speaker, reserving the right to object, I should like to inquire of the gentleman in charge of the bill whether there is anything in the bill which will have the effect of changing the present law which gives Reserve and National Guard officers retired under title III of the act of June 29, 1948, the right to draw their retired pay without regard to section 212 of the Economy Act of 1932.

"MR. WILLIS. Mr. Speaker, if the gentleman will yield, I assure the gentleman *there is no change in it.*

"MR. HALEY. I withdraw my reservation of objection, Mr. Speaker." [Emphasis supplied]

H.R. 7049 subsequently passed the House by consent.

The petitioner's final criticism of the decision of the court below is that the Act of July 1, 1947, could not have contemplated release of reserve officers retired under the Act of June 29, 1948, from the Economy Act because the right of such officers to receive retired pay did not exist when the Act of 1947 became law. This sort of argument, it is submitted, should have lost any force it may ever have had when in 1819 the Court decided the *Dartmouth College* case, 4 Wheat. 518, 566.

In closing, the respondents suggest that, whatever may be the effect of the decision of the Court of Claims, it is plainly in furtherance of basic policy of the United States to build and maintain a strong military reserve. If it be true, however, that Congress did not intend that that policy and this situation consist, the petitioner has had a whole session of Congress in which it might have sought to repair the breach, allegedly serious, made in the Economy Act by the Court of Claims. It has chosen not to approach Congress but only to seek the assistance of this Court in restoring the damage done an "outmoded" law which, upon the authority of the Comptroller General (Appendix E, *infra*), "operates against the interests of the United States". The route travelled by the petitioner would seem to be the less efficacious unless it should be, as the respondents believe, that the decision below does in truth conform to the will of Congress.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writs of certiorari should be denied.

BURR TRACY ANSELL,
Counsel for Respondents

Of Counsel:

ANSELL AND ANSELL

August, 1955

APPENDIX A

EXCERPTS FROM UNITED STATES COURT OF CLAIMS GENERAL DOCKET—GENERAL JURISDICTION, Volume 86

• • • • •

No. 543-53 Paul Tanner v. The United States.

• • • • •

Nov. 2, 1954 Plaintiffs are entitled to recover in this and cases No. 38-54 and 39-54. Entry of judgments is suspended pending the filing of a report by the General Accounting Office showing the amount due plaintiffs in accordance with this opinion. Opinion by Judge Madden.

• • • • •

No. 39-54 Elizabeth Ruth Paul, Executrix of the Estate of Earle Evarts Paul, Deceased v. The United States.

• • • • •

Nov. 2, 1954 Plaintiff is entitled to recover. Entry of judgment is suspended, etc. See opinion by Judge Madden in Paul Tanner, No. 543-53.

APPENDIX B

RULES OF THE COURT OF CLAIMS OF THE UNITED STATES
Revised October 14, 1954

• • • • •

VI. JUDGMENTS, REHEARINGS, NEW TRIALS, AND APPLICATIONS FOR CERTIORARI.

Rule 50. Judgment

Definition. "Judgment" as used in these rules includes any decree or order subject to a petition for writ of certiorari.

Rule 51. Summary judgment

* * * * *

(d) Motion and Proceedings Thereon. After a motion for summary judgment has been filed * * * such motion shall be assigned to the calendar, as provided in Rule 47 (b). The judgment sought shall be rendered if the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(e) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the Court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall, if practicable, ascertain what material facts exist without substantial controversy and what material facts are actually in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

* * * * *

Rule 52. Entry of judgment

When the Court directs the entry of judgment, the Clerk shall enter judgment forthwith upon receipt by him of the direction. The notation of a judgment on the docket, as provided in Rule 73, constitutes the entry of judgment.

Rule 53. Rehearing; amendment of judgments; new trials

(a) Grounds. (1) A rehearing may be granted, a judgment may be altered or amended, or a new trial may be granted when any party questions the correctness or the sufficiency of the Court's conclusions on its findings of fact, or desires to amend the same, or on any ground established by rules of common law or equity applicable as between private parties.

(2) The Court, at any time while any suit is pending before it, or after proceedings for review have been instituted, or within two years after the final disposition of the suit, may grant the United States a new trial and stay the payment of any judgment upon satisfactory evidence, cumulative or otherwise, that any fraud, wrong, or injustice has been done the United States.

(b) Action by Court. On a motion for a rehearing, on a motion to alter or amend a judgment, or on a motion for a new trial, the Court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(c) Time for Motion. Except as provided in subsection (a) (2) of this rule, a motion for a rehearing or a motion to alter or amend a judgment or a motion to grant a new trial shall be filed not later than 30 days after the entry of the judgment.

• • • • •

VIII. COURT AND CLERK'S OFFICE.

• • • • •

Rule 73. Docket

It shall be the duty of the Clerk to keep a general docket in which shall be entered the title and nature of all suits

brought in the Court, the names of the attorneys filing such suits, the designated attorneys of record, and all other proceedings had during the progress of the case.

APPENDIX C-1

IN THE UNITED STATES COURT OF CLAIMS

No. 543-53

PAUL TANNER, *Plaintiff*,

v.

THE UNITED STATES, *Defendant*;

No. 38-54

CHARLES C. ADAMS, ET AL., *Plaintiff*,

v.

THE UNITED STATES, *Defendant*;

No. 39-54

ELIZABETH RUTH PAUL, EXECUTRIX OF THE ESTATE OF EARLE EVARTS PAUL, *Plaintiff*,

v.

THE UNITED STATES, *Defendant*.

Defendant's Motion to Extend Time for a Motion for Reconsideration

Defendant requests that its time to file a motion for reconsideration in these cases be extended for thirty days, to January 3, 1955. These cases involve, and are of interest to, a number of different departments and agencies, including the Army, Navy, Air Force and General Accounting Office. We desire to receive and study the comments of all of these agencies before filing any motion

for reconsideration. To date we have heard from only two of the interested agencies.

Respectfully submitted,

/s/ WARREN E. BURGER
Warren E. Burger
Assistant Attorney General
Civil Division

KENDALL M. BARNES
Attorney, Civil Division
Department of Justice

APPENDIX C-2

UNITED STATES COURT OF CLAIMS

No. 543-53, 38-54, 39-54

PAUL TANNER, ET AL.

VS.

THE UNITED STATES

Clerk's Office
Washington, D. C., Dec. 3, 1954

To Attorney of Record and Assistant Attorney General, and Commissioner .....

Sirs:

Please take notice that in the above-entitled cause there has been entered this day on the defendant's motion for extension of time to file motion for reconsideration the following order: Allowed.

Respectfully,

/s/ WILLARD L. HART
Clerk, Court of Claims.

U.S. Government Printing Office 16-65195-1

APPENDIX D

Act of July 31, 1894, 28 Stat. 205, as amended, 5 U.S.C. 62

"No person who holds an office the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars shall be appointed to or hold any other office to which compensation is attached unless specially authorized thereto by law; but this shall not apply to retired officers of the Army, Navy, Marine Corps, or Coast Guard whenever they may be elected to public office or whenever the President shall appoint them to office by and with the advice and consent of the Senate. Retired enlisted men of the Army, Navy, Marine Corps, or Coast Guard retired for any cause, and retired officers of the Army, Navy, Marine Corps, or Coast Guard who have been retired for injuries received in battle or for injuries or incapacity incurred in line of duty shall not, within the meaning of this section, be construed to hold or to have held an office during such retirement."

APPENDIX E

Extract from Letter Report of General Accounting Office to Committee on Finance, United States Senate, upon H.R. 5893, 84th Cong., 1st Sess., Published in Senate Report No. 1023, 84th Cong., 1st Sess.:

Comptroller General of the United States,
Washington, July 15, 1955.

Hon. Harry F. Byrd,
Chairman, Committee on Finance,
United States Senate.

Dear Mr. Chairman: Reference is made to your letter of July 11, 1955, requesting our report upon H.R. 5893.

* * * * *

The matter of raising the amount of the limitation contained in section 212 from $3,000 to $10,000, as provided

for in section 2 of the bill, concerns one of policy which must be decided by the Congress. We feel, however, that because of the substantial increases in the compensation of Government personnel since the year 1932—the year of enactment of section 212—the $3,000 limitation contained in section 212 is far more restrictive today than it was at the time of its enactment. In 1932, CAF salaries began at $1,260 per annum. Today, GS grades begin at $2,690 per annum. In 1932, the entrance rate of salary for grade CAF-8 was $2,900. Today, the entrance rate of salary for grade GS-8 is $4,970 per annum while the entrance rate of grade GS-3 is $3,175 per annum. Thus, it may be seen that at the present time the $3,000 aggregate limitation would operate virtually in every case except those specifically excepted by statute from its application. Doubtless the existing limitation operates against the interests of the United States in those cases where the Government is deprived of the services of qualified personnel who but for said limitation would accept civilian positions under the United States.

The same thing is true, however, regarding other outmoded laws relating to dual employment and double compensation, among the most important of which are the act of July 31, 1894, as amended (5 U.S.C. 62), prohibiting a person who holds an office, the annual compensation of which amounts to $2,500, from being appointed to or holding any other office to which compensation is attached unless specifically authorized by law, and the act of May 10, 1916, as amended (5 U.S.C. 58), prohibiting the use of appropriated moneys for payment to any person receiving more than 1 salary when the combined amount of said salaries exceeds the sum of $2,000 per annum. While we would prefer the enactment of a single revision consolidating and simplifying all of the various laws presently in effect relating to dual employment and double compensation, yet in view of the short time remaining in

the present session of Congress we offer no objection to enactment of section 2 of H.R. 5893.

Sincerely yours,

JOSEPH CAMPBELL,
Comptroller General of the United States.